BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF PROTAN LABORATORIES, INC.,	)	
Appellant,	)	PCHB No. 86-20
v.	)	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	
Respondent.	)	

THIS MATTER, the appeal of a $7,000 civil penalty for alleged violation of RCW 90.48.080 concerning discharge of pollutants and RCW 90.48.160 concerning the need of a waste discharge permit, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, Gayle Rothrock and Wick Dufford, Members, convened at Lacey, Washington on April 4, 1986. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its president Joel Van Ornum. Respondent

appeared by Jay J. Manning, Assistant Attorney General. Reporter Kim L. Otis recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. Post-hearing briefs were requested. The last of these was filed May 12, 1986. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant, Protan Laboratories, Inc., is organized for the purpose of reclaiming waste crab and shrimp shells. Its purpose is to convert these to a water soluable polymer for the removal of heavy metals from industrial waste streams. Work funded by the U.S. Environmental Protection Agency has encouraged Protan to enter this field.

II

Protan decided upon Raymond as the site for its plant. The seafood and fishing industries there generate large amounts of the waste shells which are Protan's raw material. Formerly these shells were piled on the beach or removed to land fills.

III

Specifically, Protan took over the former plant of Willapa Pacific Seafoods on the Willapa River at the Port of Willapa Harbor. Acting on advice of respondent Department of Ecology (DOE), Protan, then under the name Marine Chemicals and Research, applied to DOE for a National Pollutant Discharge Elimination System (NPDES) permit before commencing operations.

IV

On June 29, 1983, DOE responded to the application by a letter stating:

> "Enclosed is a draft of the NPDES permit modification based on your May 11, 1983, application to discharge treated wastewater to the Willapa River . . . . You may discharge under the existing permit which was issued to Willapa Pacific Seafoods while the draft permit is being processed and finalized. . . . Prior to issuing the final permit, the Department will review the detailed monitoring report required by Special Condition S3 of the draft permit . . . ."

The Special Condition S3 required specific tests to "characterize" the content of the waste discharge, and required submission within 3 months of commencing operations. From these tests DOE would have devised a final NPDES permit. However, the company commenced operations in November, 1983, and did not perform or submit results of the tests.

V

Operations were shut down in the winter and spring of 1984. However later that year the company commenced production again after being purchased by new owners and provided with a new infusion of capital. The name was changed to Protan. On March 20, 1985, with still no test results, a DOE investigator visited the Protan plant. At this time workmen were replacing piling under the plant. Upon inquiry, the inspector was told by a Protan worker that the plant regularly discharged some 30,000 gallons per day of waste water into the Willapa River. In fact, the accurate amount of discharge was

approximately 2,000 gallons per day. The inspector was futher told that discharges were routed through a pipe to a septic tank and then through another pipe discharging below the surface of the River. In fact, on the day in question, the pipe to the septic tank was disconnected because of piling replacement. Discharges therefore went through the plant floor directly to the River. The inspector took a sample of the effluent in the septic tank which showed a caustic pH of 12. This was not the effluent entering the River on that day, nor is it known whether the sampled effluent ever entered the River.

VI

Following the investigation, DOE telephoned the president of Protan and requested that all future discharges be neutralized and then go to the Raymond Sewage Treatment Plant, rather than directly to the River. Protan complied at once.

VII

Nonetheless on April 19, 1985, DOE issued a regulatory Order (DE 85-287) to Protan requiring the already accomplished tasks of discharge to the sewage treatment plant and neutralization of the wastewater pH. However, the order added a critical additional requirement: submission within 15 days of an engineering report for discharge to the sanitary sewer.

VIII

On May 20, 1985, DOE issued a letter to Protan expanding on the requirements for submission of an engineering plan by citing the need for tests similar to those originally required by condition S3 of the

draft NPDES permit. Specifically the letter required the following:

> 1. Analyze for ten separate days of discharge; the flow, BOD, suspended solids, oil and grease, and pH.
>
> 2. Submit a plan prepared by a professional registered engineer for pH neutralization and monitoring of the discharge for pH and flow.
>
> 3. Submit an analysis, prepared by a professional registered engineer of the capacity (organic and hydraulic) of the Raymond treatment plant used by your discharge.

This letter extended the due date for test results to approximately July 20, 1985. The letter also referred to the asserted illegal discharge identified during the March 20 inspection and warned that a decision on issuing a penalty for that discharge would depend, in part, on the company's response to monitoring and engineering requirements.

IX

On July 19, 1985, Protan responded by a letter which cited the targeted or hoped-for results of such tests but not test results, per se. The letter noted that the company was in the process of installing a new plant at the site and expressed its desire to analyze the performance of that as yet incomplete facility, rather than what was coming from the existing plant.[1]

Three days later Protan also submitted an application for a permit to discharge its wastes to the Raymond treatment plant.

1/ This record does not show that Protan will cease operations of its existing plant upon commencing operations of its new plant.

X

On September 6, 1985, Protan sent a "first-half engineering report." This report dealt with item 2 of the three items listed in the May 20, 1985 letter. It did so on the basis of proposed discharges from Protan's new plant. The document noted that a separate report dealing with the Raymond treatment plant's ability to handle Protan's wastes (item 3) would be submitted later.

By letter of October 10, 1985, DOE advised Protan that this was inadequate to meet the requirements of the order of April 19, 1985 (as clarified by the May 20 letter).

XI

On October 11, 1985, DOE issued a Notice of Penalty (DE 85-696) to Protan assessing a civil penalty of $7,000 for alleged violations of RCW 90.48.080 concerning discharge of pollutants and RCW 90.48.160 concerning the need of a waste discharge permit both upon March 20, 1985.[2] The amount of penalty was selected with regard to both the quantity and character of waste as determined by DOE's investigation on March 20, 1985, and by Protan's failure to meet the testing requirements subsequently imposed by the regulatory order.

2/ The Notice of Penalty (Exhibit R-11) and Notice of Disposition Upon Application for Relief From Penalty (Exhibit R-16) both refer to the Regulatory Order (Exhibit R-3) as having a bearing on this matter. However, the DOE inspector has clarified by testimony here that the violations alleged are of RCW 90.48.080 and RCW 90.48.160 only, with regulatory order compliance bearing only upon the amount of penalty. The position taken by the DOE in its Written Closing Argument of Respondent is consistent with this testimony. Paragraph 1, page 1. Our finding, above, is based upon this testimony and argument.

XII

On October 29, 1985, Protan applied to DOE for relief from penalty. Ten days later, the company submitted an additional engineering report. This report responded to item 3 in the letter of May 20 in relation to the proposed new plant. It also enclosed two pages of "effluent analysis" based on operations at the old plant in August and September, in an attempt to respond to item 1 of the same letter.

On December 19, 1985, DOE sent Protan a draft permit responding to its July permit application, basing some provisions on data supplied in the engineering plans received from the company. The letter indicated that DOE was still dissatisfied with "some omissions in the engineering report." A week later, DOE denied Protan's application for relief from penalty.

XIII

Protan's new plant did not commence operations until around the first of the year 1986. On January 24, 1986, Protan appealed the penalty to this Board. Between the lodging of the appeal and the hearing DOE issued Protan a final permit for their discharges.

XIV

There is no evidence that Protan's discharges to the Willapa River on March 20, 1985, had any adverse public health or environmental impact or even posed any potential threat thereof. The magnitude of the discharge in terms of type or amount of pollutant is unknown. There is no record of any prior alleged violations.

It is, however, clear that Protan was immediately cooperative in ceasing the discharges objected to and in neutralizing the effluent sent to the Raymond treatment plant. The problems that remained unsolved at the time the penalty was issued were of "characterizing" the waste stream of a facility the company intended shortly to replace, and of analyzing the effects of discharges on the operation of the Raymond plant. The company attempted to cure these deficiencies after applying for relief from penalty but before the relief was denied by DOE. The information submitted in the engineering report of November 7, 1985, was unavailable to DOE earlier and, therefore, not considered in setting the original penalty.

XV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board makes these

CONCLUSIONS OF LAW

I

There are three issues for determination raised within this matter: 1) what is the proper role of this Board in review of penalties appealed 2) did Protan commit violations of the Water Pollution Control Act, chapter 90.48 RCW and 3), if so, is the amount of penalty assessed by DOE appropriate? We take these up in order.

II

The Board's role in penalty review. The DOE urges that when its penalty orders are appealed to this Board, our authority to modify the

amount of penalty is limited to instances in which DOE has, as a matter of law, "abused its discretion." For the reasons which follow, we disagree.

III

First, the correct role of the Board in penalty review is set forth in the Board's rules of practice and procedure. This is:

> WAC 371-08-183 HEARINGS--STANDARD AND SCOPE OF REVIEW. (1) The board will apply the specific criteria provided by law in making its decision on each case.
>
> (2) Hearings shall be quasi-judicial in nature and shall be conducted de novo unless otherwise provided by law. (Emphasis added)

IV

This rule is adopted under authority of RCW 43.21B.170 which provides:

> All proceedings, including both formal and informal hearings, before the hearings board or any of its members shall be conducted in accordance with such rules of practice and procedure as the hearings board may prescribe. The hearings board shall publish such rules and arrange for the reasonable distribution thereof. (Emphasis added).

V

The gravamen of the Department's theory on this issue is that: 1) the penalty provision of the water pollution control act places the amount of penalty within the discretion of its director and 2) such discretion can be overturned by the Board only if abused. However, the second proposition does not follow from the first. In fact, the discretion, to mitigate a penalty, cited within the Water Pollution Control Act at RCW 90.48.144, was enacted in 1967 (Laws 1967, Ex.Sess.

ch. 139, Sec. 14), prior to the advent of either DOE or this Board. When enacted, the "director" mentioned in RCW 90.48.144 and charged with penalty discretion was the director of the Washington State Water Pollution Control Commission. RCW 90.48.020 and .023. This Commission and various others were abolished by 1970 legislation which transferred their powers to both the Department and this Board. Laws of 1970, Ex. Sess. ch. 62 codified as chapters 43.21A and 43.21B RCW. In considering the meaning of the statutory discretion granted in 1967, we have considered, also, the subsequent 1970 legislation which transferred the enforcement function to DOE but conferred hearing authority upon this Board. RCW 43.21A.060, RCW 43.21B.110 and 120. ITT Rayonier, Inc. v. Hill, 78 Wn.2d 700 (1970). From this, we conclude that the 1967 legislation conferring discretion did not, and could not, establish a rule for the conduct of proceedings before this Board which at that time did not exist. Rather, the rule for conduct of proceedings is the de novo standard and scope of review, as set out in Conclusion of Law III, above. We conduct review under this rule which we have adopted as the agency charged with the administration of our 1970 hearing enabling act, chapter 43.21B RCW. The cases cited by DOE with regard to the abuse of discretion standard of review are inapposite in that they apply to judicial review, and not to review within the executive branch by such Boards as this. See San Juan County v. Department of Natural Resources 28 Wn. App. 796 (1981) wherein de novo review by the State Shorelines Hearings Board was

upheld.[3] Judicial review is applied to the decisions of this Board, and is pursuant to the State Administrative Procedure Act at RCW 34.04.130(6). Chemithon v. Pollution Control, 19 Wn. App. 689,693-694 (1978).

VI

The theory which the Department now advances regarding our review of penalties is inconsistent with precedent and practice followed by this Board throughout its existence. The consequence of this newly adopted theory is that the Notice of Penalty, unilaterally written by DOE, establishes a fine that is vested or fixed and cannot be overturned or modified unless an appellant can show "abuse of discretion". This is at odds with the observation in Yakima Clean Air Authority v. Glascam Builders 85 Wn 2d 255, 260 (1975) that the effect of a notice of civil penalty is somewhat similar to the effect of service of a summons in a civil action. Indeed, we have consistently adhered to the "summons" theory. We have assigned the burden of proof in all penalty cases to the penalty assessor, which in this case is DOE. Rather than proceeding from a final determination, DOE must proceed towards a final determination by adducing proof of both the fact of violation and the resonableness of penalty.

3/ The Shorelines Hearings Board is associated with the Pollution Control Hearings Board as both are independent, quasi-judicial boards within the State Environmental Hearings Office. Review of the granting or denial of a shoreline permit by the Shorelines Hearings Board is de novo despite the fact that such permit action is "discretionary." See West Main Assocs. v. Bellevue, 106 Wn.2d 47, 49 and 52 (1986).

VII

Lastly, the Department turns back the clock nearly two decades to cite the partial veto message of the Governor which accompanied his preponderant approval of the 1970 legislation creating DOE and this Board. The Governor's message stated:

> One of the areas where these provisions lack precision is the scope of review by the hearing board of an order of the director. While these sections do not directly address this important issue, from an examination of the entire bill and its legislative development it is clear that the legislature intended to vest in the director of the department broad resource management and regulatory powers as well as the equally broad authority to implement these powers. It is not intended that the hearings board should substitute its own judgment for the expertise of the director and his technical staff.
>
> In order to state this more completely and to resolve certain ambiguities and inconsistencies, I intend to submit to the next session of the legislature suggestions for modification and clarification of the hearings board provisions of this act. (Emphasis added).

We have endeavored, through use of the rule-making power vested in us, to provide the precision regarding our scope of review which is absent from the statute. In promulgating a rule of de novo review we have not substituted our judgment for that of DOE, for in every case to come before us the expertise of the DOE director or staff is heard, along with the opposing expertise and view of the penalty appellant. Our decision is carefully drawn from this adversary process. There was, in fact, no legislation in the following (1971) session of the legislature bearing on this issue. Moreover, in the intervening 16

years this Board has conducted hearings de novo in penalty cases too numerous for citation. Our hearing enabling statute, chapter 43.21B RCW has, in that time, been amended on numerous occasions without repudiation of the de novo review which we conduct pursuant to rule. An administrative construction nearly contemporaneous with the passage of a statute, especially when the legislature amends the statute without disturbing that administrative interpretation, is entitled to great weight. Green River College v. HEP Board, 95 Wn. 2d 108 (1980). Newschwander v. Board of Trustees 94 Wn. 2d 701 (1980), In re Lloyds Estate 53 Wn. 2d 196 (1958), Bradley v. Dept. of Labor and Industries 52 Wn. 2d 780 (1958), and White v. State 49 Wn. 2d 716 (1957). Such is the case here.

VIII

We conclude that the Board's review of penalties is not limited to the abuse of discretion standard, that its review is de novo, and is according to the evidence placed before it by adversary process.

IX

Violation of the Water Pollution Control Act. In conducting a commercial or industrial operation which resulted in the disposal of liquid waste material into the Willapa River, a water of the state, without a permit from DOE, Protan violated RCW 90.48.160 of the Water Pollution Control Act on March 20, 1985. It is not an answer to this that a "draft" permit was issued or that a prior permit existed as the efficacy of each of these extended only three months past commencement of operation by Protan under the terms of the cover letter and

Condition S3. of the draft permit. Protan continued operations for a protracted period of time after this. It did so without supplying the lawfully requested test results which are a predicate to determining whether a permit may issue and, if so, on what terms.

However, the asserted violation of RCW 90.48.080 is another matter. That section prohibits discharges which "shall cause or tend to cause pollution" of waters of the state. The Department sampled an effluent which was not from the waste stream going from the plant to the River on the day in question nor was the sampled effluent shown to have entered the River or other water body. The Department has not proven a violation of RCW 90.48.080.

X

Amount of Penalty. On April 26, 1985, the Legislature passed an act amending RCW 90.48.144, the civil penalty section of the state Water Pollution Control Act. Section 2, Chapter 316, Laws of 1985. It raised the maximum civil penalty from five to ten thousand dollars a day. Also it provided that certain matters must be considered in setting penalties. The language on the latter reads:

> The penalty amount shall be set in consideration of the previous history of the violator and the severity of the violation's impact on public health and/or the environment in addition to other relevant factors.

These changes in the civil penalty statute did not become effective until July 28, 1985.

XI

The $7,000 penalty assessed by the Department was predicated upon

both the violation of RCW 90.48.160 which was proven and RCW 90.48.080 which was not proven. The evidence establishes discharges at a lesser volume (2,000 gpd vs 30,000 gpd) than was assumed when this penalty was assessed. Moreover, there was no showing of an adverse public health or environmental impact. For these reasons, mitigation of the penalty is justified and appropriate. However, the prolonged period of operation by Protan without scientific analysis of its waste stream which was being put into a highly regarded river of the state is a significant transgression. Because of this omission, the permit process was thwarted and Protan failed to inform either itself or others of the nature of these discharges to allow for their proper regulation. Therefore a penalty of $4,000 is reasonable and justified in this matter.

XII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The $7,000 civil penalty assessed by Department of Ecology against Protan Laboratories, Inc., is hereby abated to $4,000 and, as such, is affirmed.

DONE at Lacey, Washington this 24th day of June, 1986.

POLLUTION CONTROL HEARINGS BOARD

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice-Chairman

WICK DUFFORD, Lawyer Member

WILLIAM A. HARRISON
Administrative Appeals Judge